

JUN 15 1990

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

WARREN C. TADLOCK, CLERK

In Re:

CARMEL FINANCIAL GROUP, INC.,

Debtor.

Case No. C-B-90-3015
Chapter 11

BY: ja Deputy Clerk

JUDGMENT ENTERED ON 6.15.90

ORDER DENYING RELIEF FROM STAY

This matter is before the court on Motions For Relief From The Stay Or, In The Alternative, For Adequate Protection filed by Arrowood Six and the Resolution Trust Corporation, secured creditors of the debtor. The court has concluded that these secured creditors are adequately protected by the value of the debtor's real estate in which they hold liens, at least for the near future. Consequently, the motions should be denied at this time, but without prejudice to being filed again if deemed appropriate.

BACKGROUND FACTS

The debtor owns an approximately 74 acre tract of land in southwest Charlotte, North Carolina, named "Hebron Pointe." It is the debtor's sole asset. The debtor bought the Hebron Pointe tract in the fall of 1988 with the intent of developing the property by extending Hebron Street through the entire tract and then selling smaller tracts for mixed multi-family residential, business and office uses.

The debtor financed the Hebron Pointe development with loans from Arrowood Six, in the principal amount of \$1,289,847.00 and NCF Financial Corp., in the principal amount of \$1,100,000.00.

The Resolution Trust Corporation ("RTC") as conservator for North Carolina Federal Savings and Loan Association, F.A. is the successor to the NCF Financial loan. Arrowood Six is secured by a deed of trust on most of the Hebron Pointe tract, and RTC is also secured by a deed of trust on the Hebron Pointe tract subordinate to Arrowood Six (except as to about ten acres of the tract on which it claims a superior position).

Unfortunately, the debtor confronted a major difficulty in its plan for the extension of Hebron Street. After initially approving one road design, the City of Charlotte decided to redesign the road's terminating intersection. In addition, at some point in the design process, the debtor changed engineering firms, and the prior firm, DPR Associates, filed a materialman's lien on the property to secure approximately \$20,000.00 which it claims to be owed. These delays ultimately forced the debtor into default on its obligations to Arrowood Six and RTC, and foreclosure proceedings were commenced. Before foreclosure could be completed, the debtor filed its Chapter 11 bankruptcy petition on February 1, 1990, and stayed the foreclosure.

The present status of the Hebron Pointe project is that the road is almost eighty percent complete, and all of the work that can be done on it before finalization of the intersection plans has been done. The road builder, Blythe Industries, has a contract with the debtor to finalize construction for a cost of approximately \$450,000.00, which will be paid by the City of Charlotte once the road and intersection are completed and

approved by the City. Additionally, Blythe has already put approximately \$650,000.00 into construction of the road. This sum will also be paid by the City once the project is finished. Blythe has advised the debtor that it expects to receive the city's approval of the intersection plans within a few days of the June 12 hearing on these motions. Blythe has advised the debtor that, if it can start construction of the intersection by August 1 (about 45 days from the date of this hearing), then it can complete the project within 180 days, subject to several contingencies, none of which appears to be a substantial impediment.

As of the date of the hearing, the total debt encumbering the Hebron Pointe property was \$2,806,231.26.¹ Interest on the Arrowood Six and RTC loans is accruing at a rate of \$750.60 per day, or about \$22,500.00 per month. The debtor also has unsecured debts totalling about \$404,000.00.

Two appraisers gave somewhat different valuations of the property, but the court finds that the value of Hebron Pointe is at least \$3,025,000.00 based on movant's appraisal evidence properly adjusted as noted below. T.B. Harris, Jr., MAI, made an appraisal of the property for RTC as of May 5, 1990. Using accepted appraisal techniques, he concluded that the value of the

¹ The debt encumbering the property as of the hearing date included the following: (1) Arrowood Six -- \$1,289,847.00 principal, \$225,101.36 interest; (2) RTC -- \$1,100,000.00 principal, \$128,776.35 interest and \$8,568.55 fees and collection costs; (3) City-County taxes -- \$33,914.00; and (4) DPR Associates -- \$20,024.00.

property was \$2,575,000.00 using a "cost approach" and \$2,560,000.00 using a "subdivision analysis." However, Harris reduced his preliminary appraisal by the \$450,000 cost to complete the intersection on the assumption that the debtor would bear that cost. Since the City has obligated itself to pay that cost², the \$450,000 should be added back to Harris' valuation. In other words, if Harris' appraisal had been made upon the proper assumption about the cost of the intersection, then his estimate of Hebron Pointe's value would have been \$3,025,000.00 using the "cost approach." Harris also opined that the "wholesale" value of the property based upon completion of the street and intersection is projected at \$3,215,000.00.³ Roscoe Shiplett, MAI, made an appraisal of the property for the debtor dated as of May 1, 1989. Also using accepted appraisal techniques, Shiplett concluded that the value of the project, if all improvements were completed, would be \$3,950,000.00. Both of these valuations were for "wholesale" sale of the property in one tract. Harris estimated that the total "aggregate sellout value" of the property sold to various end-users in separate subdivided tracts could be \$5,759,258.00 (which would have to be discounted to present value). Most of the witnesses expressed the belief that, although the real estate market was "soft," they did not

² Arrowood Six and RTC argue that there is no "guarantee" that the City will pay the \$450,000 to complete the intersection. But, the evidence demonstrates that there is sufficient certainty of payment to justify adding this sum back onto Harris' appraised value.

³ Harris' report also uses a figure of \$3,219,595.00.

expect any significant deterioration in values in this area in the near term.⁴

With the City paying for completion of the Hebron Street intersection, the debtor needs no additional funds to complete the project. All parties agreed that completion of the intersection so that the street runs through the property is essential to obtaining the full value of the project. The debtor is attempting to market the property both "wholesale" and in subdivided tracts to end-users. Some interest by potential buyers has been demonstrated, but no sales contracts have been proposed, or closed. The debtor has no source of funds other than sale of the project.

Arrowood Six and RTC filed their instant motions on May 14 and 24, 1990, respectively. The debtor and DPR Associates responded, opposing the motions. A full evidentiary hearing was held on June 12 at which time Blythe appeared and orally joined in opposition to the motions.

DISCUSSION

Section 362(d) provides two alternative bases for relief from the stay:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of such party in interest; or

⁴ One witness, a real estate broker, was a bit more pessimistic.

(2) with respect to a stay of an act against property under subsection (a) of this section if -
 (A) the debtor does not have an equity in such property; and
 (B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d)(1) and (2). Movants have asserted entitlement to relief from the stay under both subsections of § 362(d). The crucial issue here is the value of the Hebron Pointe property.

Section 362(d)(1) - Relief from Stay for "Cause"

Arrowood Six and RTC assert that "cause" exists to grant relief from the stay because the debtor cannot provide adequate protection of their interests in the Hebron Pointe property. It is true that the debtor has no projected cash flow from which to make any regular payments to secured creditors. It is also stipulated that the debt to Arrowood Six and RTC is increasing at a rate of \$22,500 per month. But, the court is satisfied from the evidence that the secured creditors are adequately protected by the value of the Hebron Pointe property, at least for the near future. There is ample support for concluding that the mere value of the security provides sufficient adequate protection even where the value may be eroded in the future. See, e.g., In re Liona Corp. N.V., 68 B.R.761 (Bkrtcy. E.D. Pa. 1987); Efcor, Inc. v. Bancamerica Comm. Corp. (In re Efcor, Inc.), 74 B.R. 837 (Bkrtcy. M.D. Pa. 1987); New Ulm State Bank v. Brokmeyer (In re Brokmeyer), 51 B.R. 704 (Bkrtcy. S.D. Tex. 1985); Walker v. Johnston (In re Johnston), 38 B.R. 34 (Bkrtcy. D. Ver. 1983); Northeastern Bank of Pennsylvania v. Reinhardt (In re Reinhardt), 27 B.R. 2 (Bkrtcy. M.D. Pa. 1982); Drulner v. Gaslight Village,

Inc. (In re Gaslight Village), 8 B.R. 866, 871 (Bkrtcy. D. Conn. 1981).

The lowest acceptable opinion of the value of Hebron Pointe asserted at the hearing was Harris' estimate of \$2,575,000.00.⁵ As noted above, this figure was based on the erroneous assumption that the debtor was to pay for completion of the road, and once adjusted for that, the lowest acceptable opinion of value becomes \$3,025,000.00. The actual value of the property may be much closer to Shiplett's appraisal of \$3,950,000.00 -- although that appraisal is somewhat dated. In any case, there is a minimum \$219,769.00 of equity which is available for the next few months to protect the interests of Arrowood Six and RTC.

Arrowood Six and RTC challenge the assumption that the City is going to pay the \$450,000 to complete the Hebron Street intersection. That is not a certainty, but appears reasonably certain enough to use in valuing this property. Not only does the City apparently recognize a contractual obligation to pay these monies, but Blythe is sufficiently certain of payment that it is ready to do the work in anticipation of being paid by the City. So, the court finds and concludes that the value of the Hebron Pointe property is \$3,025,000.00 and that such a value adequately protects the secured creditors.

Arrowood Six and RTC cite In Re McKillips, 81 B.R. 454 (Bankr. N.D. Ill. 1987), for the proposition that an "equity

⁵ RTC urges use of Harris' \$2,560,000.00 alternative value, but Harris himself relied on the \$2,575,000.00 figure. In any event, at this point the difference is not significant.

cushion" of under eleven percent is insufficient to constitute adequate protection. This court is not willing to accept that as a uniform mathematical rule of law. Each case must be taken on a case-by-case basis, and the adequacy of protection must be determined based upon all of the facts and circumstances of the particular case and the equitable considerations involved. Matter of Schaller, 27 B.R. 959, 962 (W.D. Wisc. 1983); Vermont Fed. Sav. and Loan Assoc. v. Burlington Tennis Assoc. (In re Burlington Tennis Assoc.), 34 B.R. 836 (Bkrtcy. D. Ver. 1983). This court agrees with the McKillips principle that when "the creditor's cushion is slim, the court must be more concerned about what the future may hold." McKillips, 81 B.R. at 458. But, the determination of the present motions is whether there exists at present sufficient value in the property to adequately protect the secured creditors' interest.

This case is unusual in one major respect -- completion of the intersection. Although the debtor has no funds to pay creditors currently, it appears likely that in the next few weeks (if not days), Blythe will be able to begin construction of the Hebron Street intersection. The only evidence is that this will occur without additional payments by the debtor. Every bit of work that occurs enhances the value of the property and directly benefits the secured creditors (without any erosion to the unsecured creditors' position). Further, the evidence suggests that real estate values have probably stabilized in this area and are not likely to deteriorate significantly in the near term. The

prospect of enhancement of the value of the Hebron Pointe property by additional intersection construction (even if Blythe is not ultimately paid for its intersection work) is a real one. The totality of these factors satisfies the court that, as of this date, the secured creditors are adequately protected by the value of Hebron Pointe property and will continue to be so protected for the near term.

Consequently, the court has concluded that there is no § 362(d)(1) cause for relief from the stay at this time.

Section 362(d)(2) - Lack of Equity and Not Needed for Reorganization

Arrowood Six and RTC have also asserted entitlement to relief from the stay pursuant to § 362(d)(2) because the debtor lacks equity in the property and it is not necessary for an effective reorganization. The court has concluded that both arguments are erroneous.

Based upon the finding of a current value of the Hebron Pointe property of \$3,025,000.00, the court must conclude that the debtor has equity in the property subject to the Arrowood Six and RTC deeds of trust.

The movants also assert that the property is not necessary to an effective reorganization because there is no reorganization in prospect. United Sav. Assoc. v. Timbers of Inwood Assoc's., Ltd., 484 U.S. 365, 108 S. Ct. 626, 632 (1988). This case does bear some of the indicia of a debtor with no realistic prospect for reorganization -- e.g., no cash, no monthly reports, no Plan. But, there are significant factors here which do give this debtor

a reasonable prospect for reorganization: While the debtor has no source of significant funds, no such funds are needed to complete the project. There may be some contingencies on the City's payment for the intersection's completion, but Blythe -- who has the most to lose on that work -- is willing to accept those risks and complete the work. There are no sales contracts to date, but interest is being shown in the property and construction of the intersection should enhance the property's marketability. The debtor does not have a long history of commercial developments, but has successfully developed a similar project in the same area as Hebron Pointe and appears to be in the best position to complete this project. That conclusion is supported by Blythe's position opposing the motions for relief from the stay for the very reason that it would like to see the debtor remain as owner in order to most quickly complete the road.

Finally, all parties have agreed that it is essential to this project that the Hebron Street extension be completed. The major impediment to that completion has been the City's approval of the revised intersection plans. That impediment appears literally on the verge of removal in a matter of days, and perhaps as this is being written. There are other less significant contingencies which could affect the project, but it appears quite likely that the project can be completed successfully

within six to eight months.⁶ So, although not certain, it appears that the debtor now stands at the threshold of an effective reorganization that is in prospect. Consequently, Arrowood Six and RTC's motions must be denied on the basis of § 362(d)(2).

CONCLUSION

The court has concluded that the motions of Arrowood Six and RTC must be denied at this point. But, that denial is without prejudice to their refiling at any time they deem it appropriate. In order to facilitate the flow of information to movants and other interested parties, the debtor must begin filing its monthly reports in the form required by previous standing Orders, and in addition, the debtor should include a detailed narrative report of all regulatory, construction and marketing activities. The debtor will also be required to respond fully and timely to all reasonable requests for information about the Hebron Pointe project by Arrowood Six or RTC.

It is therefore ORDERED that:

1. The Motions For Relief From Stay Or, In The Alternative, For Adequate Protection filed by Arrowood Six and Resolution Trust Corporation are denied;
2. Denial of those Motions is without prejudice to their refiling at any time movants deem appropriate;

⁶ The court has seen its share of crooks, con men, dreamers and pie-in-the-sky optimists. But, the court's judgment from observing the testimony and demeanor of the debtor's principal officer is that he does not fall into any of those categories, but is an able developer who is capable of successfully completing this project.

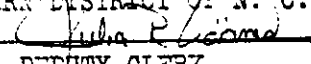
3. The debtor shall timely file Monthly Reports in the form required by standing Orders of the court and, in addition, shall include a detailed narrative description of all regulatory, construction and marketing activities relating to the Hebron Pointe project, and shall serve copies of the Monthly Reports on Arrowood Six and Resolution Trust Corporation; and

4. The debtor shall respond fully and timely to all reasonable requests for information about the Hebron Pointe project by Arrowood Six or Resolution Trust Corporation (or their representatives).

This the 15th day of June, 1990.



George R. Hodges
United States Bankruptcy Judge

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